# THE LEGAL NATURE OF INTERNATIONAL LAW.

International Law—to use Bentham's innovation of 1789, which has found favor with public, instead of the older and more expressive term, Law of Nations—has been variously denounced and praised as international morality or ethics; international courtesy or convention in the social sense of the word; comity as distinguished from rule of law, or merely and finally as the foreign policy, such as the "Monroe Doctrine," which at a particular time happens to catch the fancy of nations. If admitted as law in general or as possessing some of the elements of ordinary municipal law, the principle that pinches is declared not to be law and to have no binding force whatever, because there is no Supreme Court of Nations in which the dispute may be litigated and no sheriff to execute the decree, supposing that one had actually been delivered. But the judgment of a municipal court is not self-executing, as for instance, when President Jackson stamped his foot saying, "John Marshall has made the decision, now let him execute it!" The executive officer of the court, the sheriff or marshal did not enforce it, and that, forsooth, changed the nature of the transaction! Suppose the sheriff meets resistance in performing the mandate of the court, the armed force of the nation may be called upon and in final result the nation is in the field. Now suppose a nation declares that a principle of international law has been violated and the demand for reparation is refused, war ensues, and the Field-Marshal is no less a person than the sheriff. It is submitted that the mere form of the sanction is immaterial, and that the nature of law cannot well depend upon the whim or ability of a sheriff, or the mere success or failure of an army in the field. If the principle is binding at all—that is, if nations admit that a principle binds them, it is of no great moment whether the force is moral, ethical or physical. It does not make much difference in the end to the criminal, nor the rest of mankind whether the offender has his neck broken or

is electrocuted, provided death results. It seems, therefore, unscientific, if not positively absurd, to make the essence of a thing depend upon a mere form of punishment.

But the question is after all a quibble of words—a mere *wortstreit*—as the Germans aptly phrase it; for if modern civilized nations agree to regard a body of rules and regulations as binding them in their mutual dealings and punish infractions of this code by embargo, reprisals, retorsions, pacific blockades and war, it would seem that the sanction, that is the penalty predicated upon the element of force demanded, is present. The difference of origin and form is merged in the result. For instance, an act of Congress is the joint product of House of Representatives, Senate and President (supposing he approves it, or it becomes a law over his veto or without his action); a treaty is the act of the President and two-thirds of the Senators present. There is indeed a difference in the origin and the stages through which law and treaty pass; but the Constitution ascribes to the treaty the force of law, saying in effect that the treaty so acted upon is law, the law of the land, in precisely the same sense that an act of Congress is law.[1]

If, therefore, nations regard a principle as binding as a law which would seem not to be a law without this consent, express or implied, as evidenced by usage and custom, such principle certainly does have the force of law, although it may differ widely in its origin from the municipal law, just as a treaty differs in formation from an ordinary act of Congress.

The simple but forcible illustration of Abbé Galliani in maintaining a First Cause as against the doctrine of chance is clearly in point. There is—to paraphrase rather than to quote him literally—nothing strange in a man's throwing double sixes once; if he throws them two or three times in succession, the transaction becomes a trifle suspicious; but if he throws double sixes every time, the inevitable conclusion in the mind of every reasonable and thinking person is that the dice are loaded. Now, if nations enforce a given tenet of international law as law every time it comes into

[1]Article III, Sec. 2. Foster & Elam *v.* Neilson (1829) 2 Pet. 253, 314; Wunderle *v.* Wunderle (1893) 144 Ill. 40; Whitney *v.* Robertson (1887) 124 U. S. 190; Geofroy *v.* Riggs (1889) 133 U. S. 258. And see generally Butler's Treaty-Making Power of the United States.

play, it must surely be because it is law and binding, and if the accepted definition of municipal law does not include this law of nations, everywhere existent in modern civilized life, enforceable and enforced as law, something must be the matter with the accepted conception of law.

The early English authorities accepted the law of nations as law in the concrete, and administered it in courts of justice and common law, whenever a case arose in a court necessarily involving a question of International Law. The statement of Sir William Blackstone may be taken as summing up the view of the bench and bar in his day. In a passage of his Commentaries, not so well known as it should be, the learned expounder of the Laws of England says:

"The Law of Nations (whenever any question arises which is properly the object of its jurisdiction is here [England] adopted by its full extent by the common law, and is held to be a part of the law of the land."[1]

But it is highly probable that the judges before whom these cases came contented themselves with administering

[1] Commentaries, Book IV, Chap. 5, p. 67. The view thus expressed was not original with Blackstone. It was simply a digest of the various cases decided before and during his time in courts of justice. See Buvot *v.* Barbut (1736) Talbot's Cases 281, in which Lord Talbot held that: "the laws of nations in its full extent, was part of the land of England." To the same effect, see also Triquet *v.* Bath (1764) 3 Burr. 1478; Heathfield *v.* Chilton (1767) 4 id. 2015 per Lord Mansfield, C. J. Blackstone had been of counsel in the case of Triquet *v.* Bath, so that he spoke as one having authority.

It may not be without interest to note that Sir Robert Phillimore, likewise commentator and judge of wide experience, says briefly in confirmation of Blackstone: "In England it has always been considered as a part of the law of the land." "Commentaries on International Law," Vol. I. p. 78.

The contrary was held by a majority of one in Regina *v.* Keyn (1876) L. R. 2 Ex. Div. 63. To overrule this decision and make the laws of England conform to the law of nations, the declaratory act of 41 & 42 Vict. c. 73 was passed within two years of this discredited and universally criticised judgment. The important part of the act for the purposes of this article is as follows: "The territorial waters of her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her Majesty's dominions, as is deemed by International Law to be within the territorial sovereignty of her Majesty." The preamble declares that "the rightful jurisdiction of her Majesty * * * extends and has always extended" over such bodies of water.

Sir Henry Maine's comment follows: "In one celebrated case [Regina *v.* Keyn], only the other day, the English judges, though by a majority of one only, founded their decision on a very different principle, and a Special Act of Parliament was required to re-establish the authority of International Law on the footing on which the rest of the world had placed it" ("International Law," pp. 38 *et seq.*).

the law as they found it, and that they troubled themselves but little if at all with the question whether the principle of law correctly applied in the concrete should be regarded as law in the abstract. It is doubtful whether such a question would have interested them because there was very little English authority in existence and practically no discussion of moment or importance. Indeed Lord Talbot "argued and determined from * * * the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c.; there being no English writer of eminence upon the subject." [1]

The appearances of Bentham, however, and the rigorous examination to which he subjected law in the concrete led to a careful examination of the underlying reason of the law in general and its essential elements.[2] If the law or principle of law, stood this searching and narrow analysis, for the element of historical growth was discarded or neglected, the law was admitted to his category of laws properly so-called. If it lacked one or more of these elements it was not law, at least not perfect law in his system. The law of nations which he preferred to call International Law, was submitted to this analytical test and was found wanting.

"The nature of the case," he says, "does not admit of any judicial methods, any regular procedure * * * . A treaty between two nations is an obligation which cannot possess the same force as a contract between two individuals. The customs which constitute what is called the *law of nations*, can only be called laws by extending the meaning of the term, and by metaphor. These are laws, the organization of which is still more defective and incomplete than that of political law."[3]

[1] Quoted from the opinion of Lord Mansfield in Triquet *v.* Bath (1764) 3 Burr. 1478, because Lord Mansfield says: "I was of counsel in this case [before Talbot] and have a full note of it."

[2] "Bentham was the first English writer who viewed law as a whole or criticised English law as a system. He was the first to test English law by a logical standard." (F. C. Montague in the introduction to his admirable edition of Bentham's "Fragment on Government," p. 20). The "Fragment on Government"—a searching and withering examination of Blackstone's legal philosophy—appeared in 1776, and the "Introduction to Principles of Morals and Legislation" in 1789. This latter is perhaps his greatest work, and is at once the clearest exposition of the principle of utility and the most concise and readable statement of his chief principles. For a sympathetic and adequate account of Bentham, see Sir Leslie Stephen, "English Utilitarians," Vol. I, devoted entirely to Bentham and his philosophy.

[3] "View of a Complete Code of Laws," Chap. iv, works (Bowring's editions, Vol. III, p. 162.)

While this negation of the quality of law to international law is clear and explicit, it was reserved for John Austin[1] to formulate the objections against the essentially legal nature of the law of nations in a more specific, scientific and systematic manner. Great as the influence of Austin and his school has been and is upon legal thought in England and America, it cannot be said that master and pupil have fanned into flame "the gladsome light of jurisprudence." On the contrary they have rather smothered it so far as international law is concerned.

"Society," says Mr. Austin, "formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities *circa negotia et causas gentium integrarum.* Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

"And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.[2] As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear

[1] For a sketch of Austin, see Sir Leslie Stephen, "English Utilitarians," Vol. III, pp. 317–336.

[2] Exception might well be taken to Austin's contention that law "is set by a given sovereign to a person or persons in a state of subjection to its author." This paper, however, is chiefly concerned with the question of sanction. See Salmond's Jurisprudence, Appendix II, pp. 628–639.

In his "Essays on Some Disputed Questions of International Law" (2d ed.) Mr. F. J. Lawrence discusses the matter in detail in the essay entitled "Is there a true International Law?"

He shows that Austin only examined one element in the law, namely, force, to the exclusion of other necessary elements; that the idea of the sovereign "imposing law is true of but one stage in the development of law, the middle period, when the commands of a sovereign are obeyed because he has power to enforce obedience by coercive measures. It is not absolutely true of modern England. It is better suited to the kingdom of William the Conqueror than to the kingdom of Victoria. I do not assert that there is no element of force in our legal notions of to-day, but I deny that it is the chief element." (p. 20)

He quotes with approval (p. 13) the definition of the judicious Hooker, who says: "They who are thus accustomed to speak apply the name of law unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon, whereby actions are framed, a law."

See especially Sir Henry Maine's "Early History of Institutions," chapters on "Sovereignty," "Sovereignty and Empire," pp. 342–400.

See also Westlake's "Principles of International Law," pp. viii–ix.

on the part of sovereigns, of provoking general hostility, and incurring its general evils, in case they shall violate maxims generally received and respected."[1]

"But," says Mr. Austin in another passage, "a so-called law set by general opinion is closely analogous to a law in the proper signification of the term. And, by consequence, the so-called sanction with which the former is armed, and the so-called duty which the former imposes, are closely analogous to a sanction and a duty in the proper acceptation of the expressions."[2]

Again:

"The so-called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless *command* another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned upon law which is law improperly so called, this command is a law in the proper signification of the term. Speaking precisely, the command is a rule of positive morality set by a determinate author. For, as no supreme government is in a state of subjection to another, the government commanding does not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, the command, though fashioned on the law of nations would amount to a positive law."[3]

International law is thus according to Austin clearly a misnomer, as it is more ethical than legal in its nature.[4]

It is and from the nature of things can be nothing more than positive morality.

"Grotius, Puffendorf, and the other writers on the so-called law of nations * * * have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it *ought to be*, with that indeterminate something which they conceive it would be, if it conformed to that indeterminate something which they call the law of nature."[5]

Another and final quotation shows Mr. Austin's mature and digested view of the matter:

"Positive morality," he writes, as "considered without regard to its goodness or badness, *might* be the subject of a science closely analogous to

[1] "The Province of Jurisprudence Determined," Vol. I, pp. 231–232. The edition referred to is the fourth published in 1873 under the editorship of Robert Campbell, and entitled Lectures on Jurisprudence. References to "The Lectures" as distinguished from "The Province," are denoted "Lectures" with the appropriate page.

[2] "The Province," etc.. Vol. I, p. 189.

[3] "The Province," etc., Vol. I, pp. 188–189.

[4] Indeed he calls it "a branch of ethics" ("Lectures," Vol. II, p. 593).

[5] "The Province," etc., Vol. I, p. 222.

jurisprudence. I say '*might* be': since it is only in one of its branches (namely, the law of nations or international law) that positive morality, as considered, without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner. For the science of positive morality, as considered without regard to its goodness or badness, current or established language will hardly afford us a name. * * * But, since the science of jurisprudence is not unfrequently styled 'the science of *positive* law,' the science in question might be styled analogically 'the science of *positive* morality.' The department of the science in question which relates to international law has actually been styled by von Martens, a recent writer of celebrity, '*positives oder practisches Völkerrecht*': that is to say, '*positive* international law,' or '*practical* international law.' Had he named that department of the science '*positive* international *morality*,' the name would have hit its import with perfect precision."[1]

Admitting for a moment Austin's strictures, it is evident that a great deal of the body of international law would be law in the strict sense of the term; for a nation may and does bind itself by treaty, a positive agreement, and a violation of rights under the treaty would lead to a "*command*" from the injured state to the state guilty of the infraction. It would likewise seem to follow that if nations should recognize a custom or the body of customs which make up the law of nations,

[1] "The Province," etc., Vol. I, p. 177.

[1] An objection to this phraseology is admirably pointed out by Professor Westlake:

"Austin indeed, proposing the term 'positive international morality' as the substitute for international law, recognized by the word 'positive' some distinction among the mutual claims of states, though not connecting it clearly, if at all, with the general conviction and exercise of or the right of enforcement. But unless it be recognized that the distinction rests on that basis there is danger on the one hand of checking the progress of mankind by depreciating the less ripened claims, and on the other hand of putting claims founded only in sectional or individual interest on a par with those which express the general needs of the international society. The late Professor Montague Bernard drew attention to the latter of these dangers when he said that, 'the fallacy suggested by the phrase, "international morality" is a more practically mischievous one than the fallacy suggested by the phrase 'international law,' because the temptation to overstrain legal analogies and clothe mere opinions indiscriminately in the robe of law is less dangerous than the contrary tendency to degrade fixed rules into mere opinions' (Four Lectures on Subjects Connected with Diplomacy, p. 171). It is submitted that both fallacies may be avoided if we decline to treat the law of the land as the only proper kind of jural law, for then, while keeping law distinct from morality we shall not encourage an undue attribution to international law of the character only appropriate to the law of the land" ("Principles of International Law," pp. 13-14).

and give full effect to this custom, when rights depending upon the custom arise and enforce through municipal courts the so-called law, that the principle of decision might claim in such a case the epithet of law. The law administered in the various prize courts in civilized states is universal, practically identical, and is enforced by process of court. Each specific instance would make this law, at least for the purposes of the case, municipal law and the sanction required by Austin's definition would clearly be present. Austin would indeed allow the quality of positive law to these various instances; but he maintains that the law so applied becomes municipal or national law and loses the character of international law.

He would, however, permit it as a special privilege to be termed international, although in legal parlance it should be termed national, as distinct from international. If it be supposed that a state adopts the whole body of what is variously called international law, or law of nations, and incorporates it into its fundamental constitution, so that the difference beween the origin and form be merged in the adjudications of the courts, as is the case in the United States, where our courts administer it as the law of the land,[1] still the law in question would be simply municipal, or at most, the international law of the adopting state. For in the language of Mr. Austin:

"Each State may, however, adopt an international law of its own; enforcing that law by its own tribunals, or by its military force, (at least) as against other nations." [2]

It would, however, be law in the strictest sense of the word.

To push the matter to extremes, suppose that the civilized world should adopt one and the same uniform code and establish courts for its administration. Would not the result be a common law of nations, the law of nations so called? In a word, International law?

No, says Mr. Austin:

"If the same system of International Law were adopted and fairly enforced by every nation, the system would answer the *end* of law, but, for

[1] See The Paquete Habana *v.* United States (1899) 175 U. S. 677, and an article entitled "International Law in Legal Education," 4 COLUMBIA LAW REVIEW, pp. 409–419.

[2] "The Province," etc., Vol. II, p. 594.

want of a common superior, could not be *called so* with propriety. If courts common to all nations administered a common system of International Law, this system, though eminently effective, would still, for the same reason, be a *moral* system. The concurrence of any nation in the support of such tribunals, and its submission to their decrees, might at any moment be withdrawn without *legal* danger. The moral system so administered would of course be eminently precise."[1]

A definition which denies the name of law to that which is administered in a court of law must be either faulty in its nature or too narrow; for to ascertain and administer the law of the land is the very purpose for which courts of justice are established. The law of the land may be morally as well as legally binding, but the court administers law, not morality, unless, indeed, law be interchangeable or synonymous with positive morality. It is submitted that the Austinian conception thus tested results in an absurdity or in a mere quibble about names as such, in which the essence is sacrificed to the form.

The difficulty inherent in the Austinian conception seems to consist in the fact that Austin and his followers have analyzed law as an existing system, if, indeed, the system as such has ever existed or does now exist in a perfect form. It is admitted that a law possessing the Austinian essentials is a positive law in the strictest sense of the word. It is maintained, however, that the definition is narrow, contracted and unbending. And necessarily so, because Austin has disregarded law in the various phases of its growth. Now, law is not a cut and dried system; it is an organism and the result of organic growth. That which we call law and enforce as such did not exist in former times in the perfection and completeness required by Austin.[2] And it is

[1] "Lectures," Vol. II, p. 594.

[2] "The want of international organization chiefly makes itself felt, so far as concerns international rules, in the imperfection of the power to define and develop them. But that is a defect from which the law of the land is not always exempt in countries which have attained some considerable degree of advancement. Take, for instance, the laws of England in the period of Glanville and Bracton, say the reigns from Henry the Second to Henry the Third, when old local customs, new feudal principles and habits of action, and a good deal of Roman law, then lately made known in this country, were being fused together into one common law, and that by the judges, to whom but little express legislative help was given before Edward the First. While the process was going on, uncertainty reigned over as large a part of the laws of England as the part of international law over which it now reigns. And if we add the private violence, which then

equally true that that which was considered as law and justly, because it was administered as such in times past and in primitive communities, would not be considered as law to-day in the Austinian use of the term. And yet it was law in its day and generation, and we must therefore look upon it as law, even although it lacked that which we regard as an essential characteristic. Take a single instance and one which goes, it is submitted, to the very root of the Austinian conception. International law is not and cannot be law because of the lack of the sanction necessarily included in his definition. A vastly learned and careful writer, whose knowledge of the law and its history go hand in hand, says that

"Courts have existed with an elaborate constitution and procedure and no compulsory powers whatever. This is the state of things which we read of as prevailing in Iceland not much before the Norman Conquest. No doubt there are fabulous details even in those sages, that of Njál, for example, which contain most historical matter; but their general account of society and institutions may be taken as truthful enough for our purpose."[1]

That is to say that the municipal laws of England and the United States are more perfect, and that the Icelandic conception was less perfect, but we should scarcely deny the quality of law to the Icelandic system. And indeed it would seem that the presence of a sanction is not essential to the quality of law, for the law as such is simply a rule of conduct, and is neither self-applying nor self-executing. The rule of conduct exists, and in a perfect state, whether it be enforced or not. If enforced it is enforceable; if it is not enforced that does not imply that it is unenforceable either in this or other instances. In other words, the sanction is not an inherent part of the law as such, and the law may exist irrespective of its enforcement.[2] The court deals with the law and interprets it; the executive enforces it or fails to do so as the case may be. It is true that a sanction in

exceeded in frequency and impunity the public violence of European states in the Nineteenth Century, it may safely be said that international law is now not less certain and better obeyed than was the law of England till the process referred to was fairly complete." Westlake's "Principles of International Law," pp. 8–9.

[1] Sir Frederick Pollock's "Sources of International Law," 2 COLUMBIA LAW REVIEW, pp. 514–515.

[2] See the remarkable passage in Salmond's "First Principles of Jurisprudence," pp. 95–106.

some form is present in the ordinary conception of law, and the absence of a sanction or penalty in a criminal law, for example, would prevent its enforcement. But the *actual* enforcement or enforceability upon which Austin relies is not a part of the rule itself, but is something external and independent, and is indeed predicated upon the existence of the law.

"With regard to this contention," says Sir Frederick Pollock, "it seems fit to be considered that in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not universally true that even the highest courts in the most civilized modern States can always enforce their judgments. Thirty years before the American Civil War the State of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States [Andrew Jackson]: 'John Marshall has made the decision, now let him execute it.' But the decision by John Marshall stands as part of the law of the United States, and would do so even if its execution had been wholly frustrated in this particular case. In the Middle Ages there was nothing uncommon in rival courts within the same political allegiance obstructing one another's process and thwarting one another's jurisdiction in every way short of violence." [1]

And a further illustration of the present contention may be cited from the law of extradition. The Constitution of the United States provides that

"a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." [2]

In pursuance of this constitutional provision, Congress enacted that,

"Whenever the executive authority of any State or Territory demands any person, as a fugitive from justice, of the executive authority of any State or Territory to which such person shall have fled * * * it shall be the duty of the executive authority of the State or Territory * * * to cause him [the fugitive] to be arrested and secured," etc.[3]

Now suppose the demand is made in the form provided by the statute, and suppose an extraditable offense has been committed, the "duty" of the Executive is clear, and it rests upon a Congressional enactment authorized by an ex-

[1] 2 COLUMBIA LAW REVIEW, 514.

[2] Article IV, Section 2, Clause 2.

[3] Rev. Stat. U. S. §§ 5278, 5279.

press, not an implied, provision of the Constitution. In such a case, says Judge Cooley,

"it is the duty of the executive on whom it is made to respond to it, and he has no moral right to refuse.[1] Nevertheless, if he does refuse, no power has been conferred on the Federal Courts to compel obedience."[2]

That is to say, a clear constitutional, hence a legal, right exists on the one hand and a constitutional and legal duty on the other without any means of enforcing the right.[3] The law exists and it is law, but the sanction is absent. This may well make the law one of imperfect obligation; but does not convert it into mere morality, and it is highly probable that Mr. John Bassett Moore's valuable "Treatise on Extradition" will continue to adorn the shelves of law offices rather than grace the drawing-rooms of philosophers, moralists and preachers of the gospel. In like manner the fallacy underlying the theory of the sanction in law might be illustrated still further. For example, the Constitution declares that the "judicial power shall extend * * * to controversies to which the United States shall be a party; to controversies between two or more states."[4] Now suppose State A sues State B in the Supreme Court of the United States and gets judgment; in what manner may the judgment in favor of A be executed against B? Or suppose the United States wishes to sue a State of the Union, and the State files a cross-bill upon which judgment is given against the United States. How can this judgment be executed? And yet the judge would be astonished to be told that he was not dealing with law; that he was at most *censor morum*, discussing a question of morality, interesting but non-legal, if not illegal, because unenforceable. But enough has been said, it is hoped, to establish the contention that the sanction, although usually accompanying, is not absolutely indispensable to the conception of law. Or, in other words, law is conceivable without a sanction.

[1] See the leading case of Kentucky *v.* Dennison (1860) 24 How. 66, per Taney, C. J.

[2] Cooley's "Principles of Constitutional Law" (3d ed.) p. 210.

[3] Take another illustration from the Constitution. Article V says Congress "*shall*" under certain conditions "propose amendments," and "*shall* call a convention." The duty is clear, but how can it be enforced?

Again. Suppose a State renders itself obnoxious to the XIVth Amendment, section 2. In such a case "the basis of representation therein *shall* be reduced * * * ." How can this duty be legally enforced?

[4] Article III, Sec. 2.

But suppose for the sake of argument that the sanction is necessary. The question at once arises what kind of sanction? Is there but one or may there be many? Austin's answer is clear, precise and to the point. In a later passage this definition is further expanded and explained as follows:

"The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil. Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a punishment."[1]

"A party lying under a duty, or upon whom a duty is incumbent, is liable to evil or inconvenience (to be inflicted by sovereign authority) in case he violate the duty, or disobey the command which imposes it. The evil to be incurred by the party in case he disobey the command, *enforces* compliance with the command, or secures the fulfilment of the duty. In other words, it inclines the party to obey the command, or to fulfil the duty or obligation which the command imposes upon him. By reason of his liability or obnoxiousness to the eventual or conditional evil, there is a *chance* that he will *not* disobey: A chance which is greater or less (foreign considerations apart), as the evil itself, and the chance of incurring it by disobedience, are greater or less. The eventual or conditional evil to which the party is obnoxious, is styled a '*Sanction*'; or the Law or other Command is said to be *sanctioned* by the evil."[2]

Interrupting Austin for the moment, it is clear that the instance previously cited of extradition and suits against sister States fall outside of Austin's definition, inasmuch as disobedience is not controlled or obviated by a legal evil, and it is only legal evils with which the learned analyst is concerned.

There is but one kind of sanction in the Austinian conception; for although a distinction exists between civil injuries on the one hand and crimes on the other, the end sought is the same, namely, enforcement of obedience to the command. The means may indeed differ; the end is the same. Or to quote Austin:

"It is equally true, that where the injury is considered civil, the proximate end of the sanction *is* (generally speaking) redress to the injured party. But, still, the difference between civil injuries and crimes, can

[1] "The Province," etc., Vol. I, pp. 91–92.

[2] "Lectures," Vol. I, pp. 457–458.

hardly be found in any difference between the ends or purposes of the corresponding sanctions. For, * * * although the proximate end of a civil sanction, *is*, generally speaking, redress to the injured party, its remote and paramount end, like that of a criminal sanction, is the prevention of offences generally * * *. It cannot be said that civil and criminal sanctions are distinguished by their ends or purposes."[1]

It should perhaps be mentioned, before passing to a criticism of the term sanction as thus defined and explained, that Austin has divided all law or laws into three classes:

"Laws properly so called, with such improper laws as are closely analogous to the proper, are of three capital classes.—1. The law of God or the laws of God. 2. Positive law, or positive laws. 3. Positive morality, rules of positive morality, or positive moral rules."[2]

As to the sanctions annexed to these various laws, he says:

"The sanctions annexed to the laws of God may be styled *religious*. The sanctions annexed to positive laws may be styled, emphatically, *legal*: for the laws to which they are annexed are styled, simply and emphatically, *laws* or *law* * * *. Of the sanctions which enforce compliance with positive moral rules, some are sanctions properly so called, and others are styled *sanctions* by analogical extension of the term: that is to say, some are annexed to rules which are laws imperative and proper, and others enforce the rule which are laws set by opinion. Since rules of either species may be styled positive morality, the sanctions which enforce compliance with rules of either species may be styled *moral* sanctions. Or (changing the expression) we may say of rules of either species, that they are sanctioned or enforced *morally*."[3]

With the laws of God this paper has nothing to do. In regard to the second and third categories, it is submitted that the term "sanction," correctly applied to positive law, is too narrow and exclusive to be of permanent importance, for, broadly speaking, the means by which the rule of law is enforced is the sanction, and if the sanction—whether it be religious, legal, or moral—renders the party obnoxious to an evil, so that the command of the superior is obeyed, then it has served the purpose for which the term sanction is used. There is no magic in the mere word or phrase: the sanction is not an end in itself—it is at most

[1] "Lectures," Vol. I, pp. 520–521. The subject is further expounded in pp. 521–524.

[2] "The Province," etc., Vol. I, pp. 199–200.

[3] "The Province," etc., Vol. I, p. 200.

a means to an end, namely obedience to the command or rule of law. Any means therefore which produces the end has the force of a sanction in the particular instance, and if it have the force of a sanction, there seems to be no reason in the nature of things why it should not be called a sanction. If the means employed be not wrong in its nature and if it produces the end, namely compliance with a legal command, why should it not be termed a legal means or sanction? If it be found that a moral sanction, so called, produces or enforces compliance with the command, for example, public opinion, why should not public opinion, in so far as it produces the desired result, namely obedience, be regarded as a legal sanction? Everyday experience shows the persuasive force of public opinion, and it is perhaps not too much to say, that public opinion is more compelling in its nature than a sanction be it never so legal. The evil threatened is not necessarily or immediately imprisonment or legal punishment, but social ostracism, which is as controlling, if indeed it be not more controlling. The threat of imprisonment does not do away with the jail; but the fear of public opinion or social ostracism keeps many a weak-minded or frail being on this side of the bars. Again, it is common knowledge that a law with the appropriate legal sanction is not and cannot, for any length of time, be enforced in the teeth of public opinion, and many a law on the statute book is, for all intents and purposes, a dead letter. The history of criminal law in England furnishes a thousand and one instances of the truth of this.

The conclusion would seem to be, therefore, that the sanction, as defined by Austin, if applicable at all to law, is only applicable in a restricted sense. It is at best one of several sanctions equally effective to produce obedience to the command or the law in the strict sense. The term is accurate in the ideal case supposed by Austin; but the term as limited by him is narrow, restricted and misleading, because excluding the various means by which the end sought is ordinarily accomplished.

Admitting, therefore, that a sanction, in the Austinian sense, ordinarily accompanies law in its purely legal

sense, although it has been shown that the law administered by courts is not always, or indeed necessarily, dependent upon the presence and existence of the purely legal sanction, as in the cases of extradition and suits between the States, it is objected that the sanction defined and required by the Analytical School of Jurisprudence is too narrow and exclusive in its nature to answer the requirements of courts of justice as at present organized and existing.

A further and more serious objection to the term as used arises from the statement, that Austin is considering almost exclusively the municipal law of a state. He finds certain elements present in the ideal municipal law. He therefore assumes that these elements are and of necessity must be present. One answer to this has been given, namely, that although present to-day they have not always existed, or, if they existed, that they were at least in a rudimentary or imperfect state. The lack of historical survey and perspective vitiates his conclusions. For as Sir Leslie Stephen aptly says in speaking of the Austinian view: "It seeks to explain the first state of society by the last, instead of explaining the last by the first."[1]

But, admitting the correctness of his conclusions, does it of necessity follow that municipal law is the only form of law or that the essentials of a perfect municipal law exist and must exist in what is termed an international law? Is it not possible that two systems of law, municipal and international, may co-exist, and that each may be enforced in a different way corresponding to the nature of one and the other? May there not be a sanction for the municipal law and a different but no less binding sanction for the law of nations? Does one medicine cure all diseases, or is there a specific for a malady of another and a different nature?

Austin would negative these various assumptions, thereby following in the footsteps of the father of English analytical jurisprudence, Jeremy Bentham, who felt it a congenial and by no means an impossible task to prepare a universal code for all peoples, notwithstanding differences of time, place, origin and capacity.

[1] "English Utilitarians," Vol. III, p. 331.

Now, it is submitted that there are certain fundamental differences between municipal law, on the one hand considered as the binding laws of a single isolated and highly organized state or community, and international law, the collection of uses and customs regulating the conduct of states of the modern civilized world.[1] And it is maintained that the sanction in one case may be and is necessarily different from the sanction in the other; but that the sanction, if existing in international law, is no less worthy of respect and consideration, provided it answers the purpose for which it exists, namely, to secure the enforcement of the uses and customs composing the law of nations, be it never so different, informal or indeed formless, provided only and always that it secures obedience to the uses and customs established through the course of years, and accepted as binding and enforceable by the universal consent of civilized nations of the present day.

But the difference assumed between the municipal law on the one hand and international law on the other is not so great as would appear at first sight, for international law is, if it be law, a growth of usage and custom. In this respect it is similar to the common or customary law in the resultant law, although it differs materially in its origin. The common law is nothing but customary law, the origin of which is shadowy and uncertain, if indeed it be known. It grew up to meet the needs of a simple community, and meeting those needs, it was recognized promptly and properly as a rule of conduct. It was not the command of a superior, nor was it imposed from without,

[1] In his masterly work on International Law, the late W. E. Hall gave the following definition:

"International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."

Professor Westlake in his recently published book on International Law, Part I (1904) sets the high seal of his approval on this definition in the following words: "We have regarded our subject exactly in the light in which it is placed by Hall," p. 8.

So considered, international law is stripped of the matters of good form, taste, dress and ceremony with which many of the older treatises on the subject are incumbered. In this light, the law of nations stands or falls as a legal system.

nor did its observance require a sanction in the analytical sense. It was administered between man and man by man, and when courts existed it was the duty of the courts to declare, administer and enforce it in the particular instance. From the very nature of things the technical sanction was lacking; indeed it could not exist, because it simply grew without imposition by or indeed without a thought of a superior. The decree of the court was really sanctioned. Or to borrow Sir Leslie Stephen's happy phrase: "Custom is not really the creature of law but law the product of custom."[1] Austin's requirements are best met, and indeed they are only met perfectly, by the statute; but a system of law and a definition which would exclude the largest part of law could make little or no pretence to accuracy. It was therefore necessary for Austin to include the common or customary law in his system of positive jurisprudence. In so doing the "sovereign" cuts but a sorry figure, and the inferior is very much of an equal.[2]

To revert to the customary law. It did not matter whether the custom was wholly indigenous or not, provided only that it was a genuine custom; nor did it matter whether the custom were new provided it was wholly accepted. Nor was it important that the rule of conduct

[1] "English Utilitarians," Vol. III, p. 328.

[2] "Probably nobody," says Sir Henry Maine, "ever found a difficulty in allowing that laws have the character given to them by Austin, so far as such laws have proceeded from formal legislatures. But many persons, and among them some men of powerful mind, have struggled against the position that the great mass of legal rules which have never been prescribed by the organ of State, conventionally known as the Legislature, are commands of the Sovereign. The customary law of all countries which have not included their law in codes, and specially the English Common Law, has often had an origin claimed for them independently of the Sovereign, and theories have been propounded on the subject which Austin scouts as mysterious and unintelligible. The way in which Hobbes and he bring such bodies of rules as the Common Law under their system is by insisting on a maxim which is of vital importance to it—'whatever the Sovereign permits he commands.' Until customs are enforced by Courts of Justice, they are merely 'positive morality,' rules enforced by opinion, but, as soon as Courts of Justice enforce them, they become commands of the Sovereign, conveyed through the Judges who are his delegates or deputies. It is a better answer to this theory than Austin would perhaps have admitted, that it is founded on a mere artifice of speech, and that it assumes Courts of Justice to act in a way and from motives of which they are unconscious." ("Early History of Institutions," pp. 364–365.)

And again: "Customary law—a subject on which all of Austin's remarks seem to me comparatively unfruitful—is not obeyed, as enacted law is obeyed." (Ibid., p. 394.)

prescribed by the custom was a conscious or unconscious development or a more simple or more primitive usage. A familiar illustration of this customary growth and development is the Law Merchant which, as Sir Frederick Pollock admirably points out,

"has been so thoroughly assimilated by the national laws of all civilized countries that, as regards its separate existence, it may be said to have perished by the completeness of its own victory. But, like the law of nations, it was originally independent of municipal systems, and claimed the respect and aid of local magistrates as a branch of the law of nature, considered as a body of rules demonstrable by natural human reason, and therefore entitled to universal obedience."[1]

It has been said that international law is the body of usages and customs, binding modern civilized nations in their common intercourse. Treaties as a class are excluded from present consideration because a treaty of nation A with nation B, is a statute of nation A and nation B, and for the further reason that a treaty merely binds parties to it. Third parties cannot be bound unless they assent to it, and hence the treaty cannot be said to form part of the usage and customs of nations. It is therefore municipal in its nature, and is in every civilized country enforceable within the contracting country, and their courts as ordinary statute law. The usage or custom is different in its origin, although its effect is one and the same. Just as the customs grew up within the realm, and formed in the course of time the common law, or general custom as distinguished from the local or particular custom in force and enforceable with this locality—the law of gavelkind, for example—the customs and usages obtaining between nation A and nation B in their mutual relations grew into a rule of conduct mutually observed by them in guiding and determining their intercourse. Nations B and C applied the same principles of conduct in their intercourse, so that in the course of time, quietly and imperceptibly it may be, the body of nations found themselves employing in whole or in part this same body of usages and customs. The nation consented to the usage or custom because it enforced it, or rather applied it, and in like manner the nations generally consented to it, for, by enforcing it against others, the nation

[1] "The Sources of International Law," 2 COLUMBIA LAW REVIEW, pp. 517–518.

was bound perforce to permit its application to itself as the measure of its rights against others, and as the measure of the rights of others against it. In this manner, whether by analogy to the law of nature or the *jus gentium* of the Romans, or from a sense of the reasonableness of the transaction, or it may be from the necessity of the case, a common law of nations grew into existence and assumed a recognized and definite shape and form.[1] A new nation born into the world found its rights recognized and measured by this informal code, and the citizens of the respective nations acknowledged this law of nations, because as citizens of a lawgiving nation they were bound to observe that which the nation recognized and promulgated as a law, or as having the force of law in matters international.

Now, it is indisputable that nations so recognizing this body of usages and customs have existed at least since the Middle Ages, and it is more than a metaphor to call those so doing, the family of nations; for the term at once shows the bond uniting them, and the line of demarkation between

[1] For a statement of the necessity of an international law and the manner in which it originated, see the admirable account in Hall's "International Law," 1st edition, Appendix 1.

The language of Mr. Webster as Secretary of State may not be amiss. "Every nation," he says, "on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized States * * * .—6 Webster's Works, 437.

Not only is this true of nations; it was true of the original States of the American Union. For example: "The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this State [Pennsylvania], and is to be collected from the practice of different nations, and the authority of writers" (Respublica *v.* De Longchamps (1784) 1 Dall. 111). It is to be noted that this case was decided before the formation of the present constitution.

The text is forcibly confirmed by the language of Chief-Justice Taney in Kennett *v.* Chambers (1852) 14 How. 38, where it is said: "The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship. This principle is universally acknowledged by the law of nations. It lies at the foundation of all Government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States."

them, as a whole, and uncivilized countries that neither respect nor know the rights of others.

Now the very moment that a nation admitted the existence of a rule of conduct, it naturally bound its subjects and citizens to its recognition and the correlative duty of its observance. The custom or duty—in a word, the law of neutrality, for example—not only limits the action of a member of the family of nations, but the recognition of the law by the state, fixed at once the duty of the citizen to observe the neutrality. It follows, therefore, that the adoption of a rule or custom by a state imposes the obligation of its observance upon subject and citizen alike. For a state is nothing but a political body or corporation existing for the benefit of its corporate members, subjects and citizens, and the state has no rights in its individual or corporate capacity. The state has indeed rights not possessed by an individual member, such as the right of embassy, for example, but these various rights are for the benefit and protection of subject or citizen, not purely personal rights of the personal sovereign as formerly considered.[1] It may, therefore, be said that these rights in general are the rights of the subjects or citizens as such, and the state is simply the body corporate charged, in a representative capacity, to protect the citizen, without as well as within the territorial limits of the state in question. Take, for instance, a boundary question between two independent states. This may seem at first sight to be purely a question

[1] It is not meant to deny that a state, as such, has rights which an individual member lacks. It is meant, however, to emphasize the fact that the corporation possesses these solely for the benefit of the citizens or subjects, and that the rights of the state are measured solely with reference to the needs and benefits of such subject or citizen. In this case the abstract right of the state in any instance is predicated upon the concrete rights of the individual subjects and citizens. In this sense the following passage from Westlake's "International Law" is clear and correct: "We further see by reference to our common experience that a state proper is an ideal body, which on the one hand has a certain territory, and on the other hand is a society composed of individual men as its members and having a corporate will distinct from the wills of its members. And a like reflection will show us since the individual men associated in the state are moral beings, and the action of the state which they form by their association is their action, the state must also be a moral being, having a responsibility and conscience which are the summation of the responsibilities and consciences of its members. In this character of a moral being, having a corporate will, responsibility and conscience, a state is capable of being a subject of law and having rights." (Part I, p. 3.)

between two sovereignties. In reality, however, it is not; for it involves necessarily the rights of citizens of State A in a portion of the territory claimed by the citizens of State B. That is to say, the citizens of State A claim a right to enter into the disputed territory, to settle there permanently, and carry on their various pursuits, secure in the protection of the laws of their country. The state, therefore, when it acts against B, acts in a representative capacity, not merely because its rights had been denied or violated, but because the rights of its subjects or citizens have either been violated or threatened. This is the import of the transaction in contemplation of law, although in a general and loose sense it may be said that the rights of the state have been injured or are threatened.[1] A careful examination of almost any international problem will resolve itself into this state of facts, so that the claim of a state to the protection of a principle of law necessarily involves and carries with it the right and duty of citizen or subject in the rule, usage, custom or law invoked. This usage thus becomes, not merely a rule for the guidance of the state, but for the guidance, enjoyment and observance of the individual member of the body politic, and the very claim of the rule in question makes it of necessity a measure of the municipal right and duty.[2]

If, then, the recognition of the body of usages and customs

[1] See the following boundary cases in which the principles of international law were applied, and correctly, to the solution of the difficulty: Foster and Elam *v.* Neilson (1829) 2 Pet. 253, in which the court rightly followed the decision of the political department in its representative capacity; U. S. *v.* Texas (1892) 143 U. S. 621; Rhode Island *v.* Mass. (1838) 12 Pet. 657, and same case at later period (1846) 7 How. 491; Indiana *v.* Kentucky (1890) 136 U. S. 479; Virginia *v.* Tennessee (1892) 148 U. S. 503.

As an admirable exposition of the way in which private rights arise and are regulated by the principles of international law, see the elaborate and careful opinion of Chief Justice Shaw in Commonwealth *v.* Blodgett (1846) 12 Met. 56.

[2] The prevalent idea that a personal sovereign has greater rights than a president or chairman of the political corporation may be put down as a popular fallacy or as a remnant of the defunct theory of divine right. A state sues as a state, a political corporation, whether the chairman for the time being happens to be czar, emperor, king or president. See the following cases from among the many that might be cited; Republic of Honduras *v.* Soto (1889) 112 N. Y. 310; The Sapphire (1870) 11 Wall. 164.

See to same effect Westlake's "International Law"; Part I. p. 3.

forming the bulk of international law involves their adoption both by the State so recognizing, subjects and citizens thereof, it follows, as said, that the usages and custom of international law become, for the purpose of state and citizen, municipal law of such state and citizen, and that such usages and customs become the common law of each and every state so recognizing and adopting. There then presents itself a body of fixed and binding law —the common law of nations—just as clearly and surely as the common customs and usages of England became the common law of that realm.

The reasoning by which this conclusion is reached may be faulty and open to attack, but the result, it is submitted, is beyond refutation. If the usages and customs are adopted *en bloc* by the statute of a particular state, such statute would be declaratory merely of the usages and customs, and would not be true laws in the Austinian sense. The usages and customs would be the laws, and the declaratory laws, to quote Austin, "Are merely analogous to laws in the proper acceptation of the law." And again: "Declaratory laws and laws repealing laws ought in strictness to be classed with laws metaphorical or figurative: for the analogy by which they are related to laws imperative and proper is extremely slender or remote."[1]

Laying aside theory and coming to the realm of tangible fact, it was squarely held in the English case of Buvot *v.* Barbut,[2] Triquet *v.* Bath,[3] Heathfield *v.* Chilton,[4] and in numerous American cases culminating in Paquete Habana *v.* United States,[5] that

"International Law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals,

[1] "The Province," etc., Vol. I, p. 219. See note on Regina *v.* Keyn, *ante.*

[2] (1736) Talbot's Cases 281. [3] (1704) 3 Burr. 1478.

[4] (1767) 4 id. 2015. [5] (1899) 175 U. S. 677, 700.

not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

If this be so—and repeated adjudications of the Supreme Court have settled it as clearly as a court of justice can settle a question properly before it—it follows that the Court takes judicial cognizance of International Law as it does of a principle of law purely municipal in its origin. That this should be so in theory, no argument is needed; but an adjudged case will place it beyond the possibility of denial or cavil.

In the case of The Scotia,[1] the Supreme Court had occasion to examine a question of maritime law, and Mr. Justice Swayne thus expressed himself in delivering the opinion of the august body of which he was a member:

"Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world.

"This is not giving to the statutes of a nation extraterritorial effect. It is not treating them as general maritime laws, but is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts but it is not so with the law of nations."[2]

It must be conceded, therefore, that these usages and customs, however arising, provided they have the express or tacit assent of the family of nations, are part and parcel of municipal law and will be—nay, must be—so treated in an American court of justice.[3]

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[1] (1871) 14 Wall. 170.

[2] A rather amusing instance of the extent to which International Law is part of the municipal law of the United States, consequently of each State and Territory of the Union, was afforded by the recent Gurney-Phelps incident, in which a municipal ordinance of Massachusetts, on the subject of speeding in public thoroughfares, yielded to the claim of diplomatic immunity as sanctioned by International Law.

[3] It may be well to note the following statement from Sir Robert Phillimore: "Most, if not all, civilized countries have incorporated into their own Municipal Law a recognition of the principles of International Law.

"The United States of North America, almost contemporaneously with the assertion of their independence, and the new Empire of Brazil, in

This may well be admitted in a case presented to a court, and the process of the court will enforce its decree as in any other case, for sovereign and sanction are present if either or both be necessary. But many cases arise in which plaintiff and defendant do not come within the jurisdiction of the courts and cannot be reached by summons and process. Or it may be that a foreign state will not recognize the decision of the court affecting its citizen. For example, a judgment of a Venezuela court affecting the claim to territory recently in controversy between Great Britain and Venezuela would not be recognized by Great Britain, and on an appeal to Great Britain the government of that country would espouse the cause of its subject, and threaten with force, in its representative capacity, the State of Venezuela. Inasmuch as there is no common court of appeal to which Great Britain and Venezuela might resort, for equals can have no superior, there is but one way, namely, an appeal to the sword to determine which contention shall prevail.

But suppose the controversy be referred to a board of arbitration or to the Hague Tribunal, such board, commission or tribunal has no power to enforce its decree. There is no sanction, and hence the principle of right and justice cannot prevail. Or if the countries in question stipulated by treaty in advance to abide by the decision, this submission, says Austin "might at any moment be withdrawn without legal danger."[1]

To which it might be answered that no rights can accrue under a statute because the sovereign power might at any moment repeal the statute.

This is, however, a real and serious difficulty and raises the question squarely whether a sanction exists in international law when the right in litigation does not arise in the municipal court of one or other of the nations, but arises between two given nations acting in their representative capacity. The reply must be that no *legal* sanction of the kind suggested and required by Austin exists at present in the law of nations, but that obedience to a principle of

1820, proclaimed their national adherence to International Law; in England it has always been considered as a part of the law of the land." (Commentaries on International Law, Vol. I, p. 78.)

[1] "Lectures," Vol. II. p. 594.

international law results from public opinion—in this case international opinion.[1] If express international opinion does not secure obedience to the principle of international right, the nation affected enforces or seeks to enforce the obedience, or to redress this disobedience to international rights by war, and "war," says a learned writer on jurisprudence, "is the last and most formidable of the sanctions which in the society of nations maintain the law of nations."[2]

War is undoubtedly an *evil* annexed to the infraction of international right, and the "fear" or "chance" that war may follow disobedience to a claim of right based upon the usages and customs of nations is surely an *evil* sufficient to satisfy the intelligent citizen of to-day, even if it failed to meet the technical requirement of Austin.

The fear of war is sufficient in countless cases to prevent the prospective violation of the common law of nations, and the fear of war does in most, if not in all, cases prevent a resort to its *evils*.

It is therefore submitted that the usages and customs of International Law are for the very reason that they are the usages and customs of the Law of Nations, an integral part of the Municipal law of each and every member of the family of nations; that the Municipal Courts of such

[1] See Sir Edward S. Creasy's "First Platform of International Law," pp. 65–76. As a trained lawyer and one-time Chief Justice of Ceylon, his opinion should carry great weight.

[2] Salmond's Jurisprudence or the Theory of the Law, p. 14.

"It may be asked accordingly," says Sir Travers Twiss, "what are the Physical Sanctions to the Rules which regulate the intercourse of Nations? It was one of the main objects of the system of Grotius to supply an answer to this question. The Right of War, *purum piumque duellum* according to the *formula* of the Roman Fecials furnishes the Principle. 'War,' said the great Athenian orator in the declining days of Athens, 'is the mode of proceeding against those who cannot be restrained by a Judicial Proceeding; for Judicial Proceedings are of force against those who are sensible of their inabilility to oppose them, but against those who are or think themselves of equal strength, War is the proceeding; yet this too, in order that it may be justified, must be carried on with no less scrupulous care than a Judicial Proceeding. * * * 'The Rules of Conduct which govern the Intercourse of Nations are not improperly considered to form a body of law, strictly speaking, as they have Physical Sanctions of no ordinary character in the consequences of War. The Ruins of Sebastopol [Port Arthur?] bear convincing testimony that this is not a fiction of Jurists, but a stern reality of International Life." Law of Nations; Rights and Duties of Nations in Time of Peace, pp. VII.–IX.

Inasmuch as Sir Travers Twiss spent a lifetime at the bar as a successful practitioner in international questions, his opinion has a peculiar technical value.

nations either consciously or unconsciously administer and enforce principles of international law whenever the particular case involving a question of such law of nations comes before them for adjudication; that a sanction, even the strict legal sanction of the analytical jurist is present in such cases; that cases involving an abstract right in issue between two nations in their representative capacities are settled in accordance with the common law of nations, and that this obedience is compelled either by public opinion—that is, international opinion—or by the last and most formidable sanction known to nations and mankind—War.

No attempt has been made to formulate a definition of law broad enough to include both municipal law in its narrow and restricted sense, and law as it occurs in the expression law of nations. The definition of Austin has been criticised and its accuracy questioned, if indeed its inadequacy has not been demonstrated; for it is evident that no definition of law is nor can be correct which ignores law as daily administered in a court of justice. It is fair in such instances to presume that the definition of law which excludes the law of the land is inaccurate, rather than that the courts administer as law that which is not and cannot be law.[1]

The fundamental objections of the school of analytical jurisprudence to the law of nations as law in the concrete, if not in the abstract, has been examined and criticised, for the further reason that this school has and does deny a legal character to the law of nations, in consequence of which a system, thoroughly legal and scientific in its nature, has fallen into disrepute.[2]

[1] The question of the scientific definition of law has been admirably handled by Dr. Melville M. Bigelow in 5 COLUMBIA LAW REVIEW, pp. 1-19, in which Blackstone's and Austin's theories have been questioned and refuted.

[2] By way of an apology for refuting Austin's views, Mr. Westlake—perhaps the leading International Lawyer of the English-speaking world—says: "It is also necessary because of the dominant position which certain views of John Austin have held in the English universities. * * * That eminent thinker rendered great service by elucidating the various elements, psychological states and states of fact, which have to be provided for by the law of a country, and the knowledge which makes up the larger part of what in the English universities is called jurisprudence. But he prefaced his system by analysing the law of a country into commands addressed by a sovereign to subjects, including in his description of the sovereign all those who participate in the supreme authority. And the

The analytical school—of which Austin is the prophet—has performed a great service in directing attention to the foundations of a scientific jurisprudence, but a devotion to law in the abstract, without an adequate appreciation of the importance of history in the law, has led to a system at once artificial, inadequate and, indeed, inaccurate.

In conclusion, the present writer would like to quote as expressing in an admirable and unexceptional way the true reason for the existence of a system of International law, and the nature of the sanctions by which the system is enforced, a remarkable passage from a work worthy of the highest commendation, but too little known or appreciated at the present day.

"When everything else, says Sir Robert Wiseman, has a law to guide it, inasmuch as no one society, or petty commonwealth, can stand without some law, the like necessity must there needs be of some law to maintain and order the communion of nations corresponding and acting together. The law, which guideth the transactions, which are usually observed to arise between grand societies is the law of nations. The strength and virtue of which law is such, that a people can with as little safety violate it by any act, how advantageous soever it may seem to be to the whole body; as a private man can in hope to benefit himself infringe the law of his country. Nay, of such power and pre-eminence is the law of nations, that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man by his private resolutions, the law of the whole commonwealth or state wherein he liveth; for as a civil law being the act of the whole body politic, doth thereby overrule each several part

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definition of the law of a country which resulted from that analysis he gave as the definition of law, so that international law, not being set by an Austinian sovereign to Austinian subjects, was in his view not law at all, but what he called positive international morality. Now this was beside the mark of what followed in his own lectures. In elucidating the elements with which the law of a country must be concerned Austin found no use for his definition of law, perhaps it was impossible to find any; and thus we are fortunately able to retain most of the fruits of his labour, unaffected by the doubt which has at last arisen about that definition." Westlake's "Principles of International Law," pp. vi.–vii.

And again: "Whatever merit Austin's analysis may have for the law of a country, his treatment of international matters appears to be inadequate, as, notwithstanding his great ability, it well may have been from his not having given them much attention." *Op. cit.* p. VIII.

And finally: "We shall probably feel less surprise that the revolt against that [Austin's] nomenclature has now become so general than that a writer of such great ability should have adopted it, and that it should have reigned so long in the legal literature of England." *Op. cit.* pp. 11–12.

That mature reflection has only strengthened Professor Westlake in his opposition to Austin's views, see International Law—Part 1, pp. 5–9 (1904).

of the same body; so there is no reason that any one commonwealth of itself should, to the prejudice of another annihilate that, whereupon the whole world hath agreed.[1]

"The inadequacy of its sanctions is an imperfection which attaches to international law in common with all other law; for there is no law so practically perfect as to allow no crime to go without punishment, and no wrong without redress. Opinion and force are the only sanctions of law, and international and municipal law, so far as the former is capable of being administered by judicial tribunals, are in this respect not distinguishable. Nor, where this capacity ceases are they specifically distinguishable by the mischiefs that attend the means that are necessary to enforce them. The evil of which international law justifies the infliction upon an offending state, reaches its unoffending members; but the punishment, which municipal law inflicts upon a criminal, affects his innocent relations. The one is as much law in the strictest sense of the term as the other; but it is not capable of being enforced with as much certainty and as little mischief. The difference is a difference of gradation and not of kind." [2]

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[1] Excell. of Civ. Law, p. 99, et seq.; Vatt. I, 283—II, 53, 70.

[2] Richard Wildman's "Institute of International Law," Vol. I, pp. 31–32.